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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SHASTA

JAMES M. CONLEY, an individual, on
behalf of himself and on behalf of all persons
similarly situated,

Plaintiff,

v.

SISKIYOU FOREST PRODUCTS, a
California Corporation; and DOES 1-50,
Inclusive,

Defendants.

Case No. 195819

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND PAGA ACTION
SETTLEMENT**

Hearing Date: May 23, 2022
Hearing Time: 8:30am

Judge: Hon. Stephen H. Baker
Dept.: 3

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I. INTRODUCTION

Plaintiff JAMES CONLEY (“Plaintiff”) seeks preliminary approval of the Stipulation of Settlement of Class Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 144 Class Members. The basic terms of the Agreement provide for the following:

1. The “**Class Members**” and “**Class Period**” shall mean with respect to the class, all of defendant SISKIYOU FOREST PRODUCTS (“Defendant”) current and former non-exempt employees employed in California September 14, 2016 and November 5, 2021 (“Class Period”). Agreement at § I(G). The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I (FF).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all of Defendant’s current and former non-exempt employees employed in California between September 14, 2019 and November 5, 2021 (“PAGA Period”). Agreement at §I(B).

3. The “**Gross Settlement Amount**” is Two Hundred Thirty Thousand Dollars (\$230,000). Agreement at §§I (GG). The releases granted to Defendant only become effective upon the funding of the Gross Settlement Amount. §III(B). The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Service Award**” in the amount of up to \$10,000 to Plaintiff for his services on behalf of the Class, and for agreeing to a broad general release of California Civil Code section 1542, subject to Court approval after Defendant has an opportunity to object. Agreement at § III(M)(9).

b. A “**Class Counsel Award**” in the amount not to exceed one-third of the Gross Settlement Amount for attorney’s fees, currently estimated to be \$76,667 **and** litigation costs and expenses not to exceed \$15,000, to be paid to Class Counsel. Agreement at §III(M)(10).

c. A “**PAGA Settlement**” of \$10,000 shall be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 (“PAGA Amount”). The Settlement Administrator shall pay 75% of the PAGA Settlement (“LWDA

¹ The Agreement is attached as Ex “A” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Agreement.

1 Payment”) to the California Labor and Workforce Development Agency. The Settlement
2 Administrator shall distribute 25% of the PAGA Amount (“Aggrieved Employee Payment”) to
3 members of the Aggrieved Employees. Agreement at §III(M)(11).

4 d. And “**Claims Administration Expenses**” not to exceed \$7,900 payable to the
5 proposed Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice
6 Packet and Individual Settlement Payments. Agreement at §III(M)(12).

7 4. The “**Net Settlement Fund**” of approximately \$120,433.33 (Gross Settlement Amount
8 minus the requested Service Award, Class Counsel Award, PAGA Settlement and Settlement
9 Administration Costs [assuming the Court awards \$10,000 to Plaintiff for his service award]) which
10 will be allocated to all participating members of the Class, i.e., Settlement Class Members, on a pro-
11 rata basis according to the number of Workweeks each Settlement Class member performed during the
12 Class Period. The entire Net Settlement Amount will be paid to all Settlement Class Members resulting
13 in an average Individual Settlement Share of **\$836.34**. Agreement at §III(M)(1); Zakay Dec., ¶ 5.

14 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
15 Class is fair, reasonable, and valuable. The Settlement was negotiated by the Parties at arm’s length.
16 The Settlement confers substantial benefits to the Class. The relief offered by the Settlement is
17 particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage
18 and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class Members will
19 not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being
20 denied or of Defendant prevailing at trial. Zakay Dec., ¶ 5.

21 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement
22 approval under California law and falls within the range of reasonableness. The average Individual
23 Settlement Share to the Settlement Class meets or exceeds awards in similar wage and hour class
24 actions. Moreover, the proposed Class is appropriate for provisional certification. Accordingly,
25 Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement. Zakay Dec.,
26 ¶ 6.

27
28 ///

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant owns and operates a 35-acre manufacturing plant in Anderson, California. Zakay Dec., ¶ 7. Plaintiff worked for Defendant as an hourly, non-exempt employee between November 2017 to February 2020. As a non-exempt employee, Plaintiff was subject to Defendant's written policies and procedures and general employment practices. Zakay Dec., ¶ 8.

Generally, Plaintiff claims that Defendant failed to pay him for all hours worked, including for overtime, failed to provide complaint meal and rest periods, failed to provide accurate itemized wage statements, and failed to pay all wages due at the time of his separation.

Defendant denies liability for each of Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment laws. Defendant asserts that it had clear compliant policies and procedures such as for taking rest and meal periods as outlined in its policies and additional technical assistance for accurate time keeping. Defendant raised several other significant defenses to Plaintiff's claims, including but not limited to, lack of any evidence of overtime and minimum wage violations, and the opportunity and encouragement to take all meal and rest-breaks compliant with its policies and the law. Zakay Dec., ¶ 9.

On July 9, 2020, Plaintiff served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 et seq ("PAGA"). Zakay Dec., ¶ 10.

On September 14, 2020, Plaintiff filed a class action complaint in the Shasta County Superior Court for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure to pay minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3) failure to pay overtime wages in violation of California Labor Code sections 510 *et seq.*; (4) failure to provide required meal periods in violation of California Labor Code sections 226.7 and 512; (5) failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512; (6) failure

1 to provide accurate itemized wage statements in violation of California Labor Code section 226; (7)
2 failure to provide wages when due in violation of California Labor Code sections 201, 202 and 203;
3 and (8) violations of the California Labor Code Private Attorney General Act (“PAGA”). Zakay Dec.,
4 ¶ 11.

5 Plaintiff commenced written discovery in December 2020. Defendant responded to Plaintiff’s
6 discovery and propounded its own discovery. The Parties began meeting and conferring regarding
7 Defendant’s and Plaintiff’s discovery responses, but prior to resolving disagreements over discovery,
8 the Parties agreed to mediate this action as deemed in the best interest of the parties in particular in
9 light of the many anticipated factual disputes. In anticipation of mediation, the Parties stipulated to
10 stay formal discovery. To prepare for mediation, the Parties agreed to informally produce certain
11 documents and data points subject to the mediation privilege, including but not limited to, a sample of
12 the Class Members’ time and payroll data. As discussed *infra*, Plaintiff’s counsel retained the Berger
13 Consulting Group, to analyze Defendant’s time and payroll data. Zakay Dec., ¶ 12.

14 On November 5, 2021, the Parties participated in a full day mediation with (Ret.) Hon. Brian
15 Walsh. After arms-length negotiations and bargaining, the parties reached an agreement to settle and
16 signed a Memorandum of Understanding. After reaching an agreement in principle, the parties drafted
17 and negotiated a long-form settlement agreement, which is the subject of the instant motion. Zakay
18 Dec., ¶ 13.

19 **B. Class Counsel Thoroughly Investigated the Factual and Legal Issues**

20 Months before filing the Action, Class Counsel began its pre-filing investigation into Plaintiff’s
21 complaints. Class Counsel’s investigation started with several lengthy interviews with Plaintiff. As
22 part of the interview process, Plaintiff produced documents related to his employment for Defendant,
23 including portions of Defendant’s handbooks, compensation policies and time and payroll records. At
24 the conclusion of the interviews, Class Counsel determined that Plaintiff’s complaints justified further
25 inquiry. Zakay Dec., ¶ 14.

26 Class Counsel subsequently requested Plaintiff’s employee file from Defendant. In response,
27 Defendant produced hundreds of pages of documents, including but not limited, a copies of Plaintiff’s
28 hiring documents, payroll and time records, performance reviews and separation documents. Class

1 Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate
2 Plaintiff's claim that Defendant's failed to, among other things, provide compliant meal and rest
3 periods. Shortly thereafter, Class Counsel summarized the known factual and legal issues in the PAGA
4 Notice addressed to the LWDA. Approximately 65 days later, Class Counsel filed this class action.
5 Zakay Dec., ¶ 15.

6 After serving Defendant with the complaint, Plaintiff propounded written discovery. Defendant
7 responded to Plaintiff's discovery and served its own discovery. In light of the many anticipated factual
8 disputes, the parties agreed it would be in the best interest of both parties to mediate the matter. To
9 prepare for mediation, Class Counsel requested several documents and data points to further evaluate
10 Plaintiff's claims and Defendant's liability exposure to the Class Members. In response to Class
11 Counsel's request, Defendant produced the time and payroll records for the Class Members, aggregate
12 workweek and pay period data for the Class, and copies of applicable handbooks, policies, and
13 agreements containing, *inter alia*, compensation, timekeeping and, meal and rest period policies. Zakay
14 Dec., ¶ 16.

15 Class Counsel then retained the statisticians and economists at Berger Consulting Group
16 ("BCG"), to evaluate the Class Members' payroll and time data. BCG provides data analysis and
17 damage modeling consulting services specializing in wage and hour class actions. BCG's team of
18 financial and data analysts are credentialed and experienced experts in their fields and have provided
19 their expertise on thousands of cases. Stated differently, the BCG is uniquely qualified to analyze
20 Defendant's time and payroll data. Zakay Dec., ¶ 17.

21 BCG analyzed Defendant's time and payroll data to assist in the development of various damage
22 models. Among other things, BCG determined the approximate number of work shift, work weeks,
23 pay periods, average rate of pay, average length of shift and average number of hours worked per week
24 and pay period during the Class Period. BCG also estimated the number of missed or late meal and
25 rest periods, the amount of paid missed meal period premiums paid during the Class Period. Zakay
26 Dec., ¶ 18.

27 In advance of mediation, Class Counsel created a damage model predicated on BCG analysis.
28 Class Counsel's model calculated Defendant's potential liability exposure while accounting for the

1 uncertainties of continued litigation. This damage model informed and guided Class Counsel during
2 the mediated settlement discussions. Zakay Dec., ¶ 19.

3 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
4 Plaintiff's suitability as a putative class representative through interviews, background investigations,
5 and analysis of his employment files; (2) evaluating all of Plaintiff's potential claims; (3) researching
6 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
7 of employer; (4) analyzing the Class Members' time and payroll records; (5) analyzing Defendant's
8 labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues
9 which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's
10 liability for purposes of settlement; (8) drafting the mediation brief and (9) participating in the
11 mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the
12 claims being settled, as well as the impediments to recovery, such as to make an independent
13 assessment of the reasonableness of the terms to which the parties have agreed. Zakay Dec., ¶ 20.

14 **C. The Parties Settled at Mediation**

15 On November 5, 2021, the Parties conducted a full day of mediation with (Ret.) Brian Walsh, a
16 highly regarded mediator, and former Santa Clara County Superior Court Judge. Judge Walsh helped
17 to manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to
18 both sides. The Parties made substantial progress with Judge Walsh's assistance. Namely, the parties
19 exchanged information regarding their respective claims and defense, including their respective
20 evaluation of the damages. After more than eight hours arm's length and adversarial negotiations, the
21 mediation nearly concluded without a settlement. However, at the conclusion of the mediation, Judge
22 Walsh issued a proposal for settlement that the Parties accepted. The complete and final terms of the
23 Parties' settlement are now set forth in the Agreement. Class Counsel submits that the Settlement
24 constitutes a fair, adequate, and reasonable compromise of the claims at issue. Zakay Dec., ¶ 21.

25 **D. The Proposed Settlement Fully Resolves Plaintiff's Claims**

26 1. The Composition of the Class Members

27 The proposed Class consists of all Defendant's current and former non-exempt employees
28 employed in California between September 14, 2016 and November 5, 2021. Agreement at § I(G).

1 The Settlement Class excludes any person who submits a timely and valid request for exclusion.
2 Agreement at §§ I (FF). There are approximately 144 members of the Class that worked an estimated
3 13,000 workweeks during the Class Period. Agreement at §III(A)(2).

4 2. The Settlement Consideration

5 The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement
6 Amount of \$230,000. The Gross Settlement Amount Fund: (1) Individual Settlement Payments to the
7 Settlement Class; (2) a Service Award of up to \$10,000 to Plaintiff for his services on behalf of the
8 Settlement Class and, equally important, for a general release of claims (subject to Defendant's
9 objection and Court approval; (3) a PAGA Settlement in the amount of \$10,000; (4) Settlement
10 Administration costs estimated at \$7,900, (5) Class Counsel Award in the amount of \$91,667 comprised
11 of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be at least \$76,667
12 and an estimated \$15,000 for actually incurred litigation expenses. Agreement at §III(M).

13 Subject to the Court approving the Service Award, Class Counsel Award, PAGA Settlement,
14 and Settlement Administration Costs, the Net Settlement Amount will be distributed to each Settlement
15 Class Member. Agreement at §III(M)(1). There is no reversion to Defendant and Defendant must
16 separately pay for its share of the employer payroll taxes. Agreement at §III(A)(1).

17 3. Formula for Calculating Individual Settlement Payments

18 Each member of the Settlement Class will receive an Individual Settlement Payment. The
19 Individual Settlement Payment will be proportional to the number of Workweeks each member of the
20 Settlement Class worked for Defendant during the Class Period. Using the Class Data, the Settlement
21 Administrator shall add up the total number of Workweeks for the entire Settlement Class. Each
22 Settlement Class Member's final Individual Settlement Payment for purposes of payment will be
23 calculated by multiplying the NSF by a fraction, the numerator of which is the Settlement Class
24 Member's total number of Workweeks, and the denominator of which is the total number of
25 Workweeks of all Settlement Class Members. Agreement at §III(M)(1).

26 Each Individual Settlement Payment will be reduced by any legally mandated employee tax
27 withholdings (e.g., employee payroll taxes, etc.). Agreement at §III(M)(1). Individual Settlement
28 Payments for Class Members who submit valid and timely requests for exclusion will be redistributed

1 to Settlement Class Members on a pro rata basis. Agreement at §III(M)(1).

2 Given that there are approximately 144 Class Members, assuming there are no opt-outs, the
3 average gross recovery is approximately \$836.34 (Net Settlement Amount divided by Settlement Class
4 Members). This average net recovery exceeds many wage and hour class action settlements approved
5 by California state and federal courts. (See, e.g., *Shachno et al. v. KT Hotels, LLC, et al.*, San Diego
6 Superior Court Case No. 37-2018-00043601 (average net recovery of \$283.35); and *Crawford et al. v.*
7 *Outlook Amusements, Inc.*, Los Angeles Superior Court Case No. BC617160 (average net recovery
8 \$333.98).

9 4. Release by Settlement Class Members

10 Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to
11 release the Released Parties from the Released Claims (all class claims alleged, or wage and hour class
12 claims which could have been alleged, at any time or in any manner in or during the Action based on
13 the facts alleged in the Action, which occurred during the Class Period, and expressly excluding all
14 other claims, including claims for vested benefits, wrongful termination, unemployment insurance,
15 disability, social security, workers' compensation, and class claims outside of the Class Period).
16 Agreement at §§I(Z) and III(B).

17 5. Release by the LWDA and the Aggrieved Employees

18 Generally, upon the Funding Date the LWDA and the Aggrieved Employees will release all
19 PAGA Claims alleged in the Action and/or Plaintiff's PAGA notice to the LWDA and all PAGA claims
20 that could have been alleged at any time and any manner, in or during the Action based on Plaintiff's
21 PAGA notice to the LWDA, which occurred during the PAGA Period, and expressly excluding all
22 other claims, including claims for vested benefits, wrongful termination, unemployment insurance,
23 disability, social security, workers' compensation, and PAGA claims outside the PAGA Period.
24 Agreement at §§I(AA) and III(C).

25 **III. ARGUMENT**

26 **A. The Court Should Preliminarily Approve the Proposed Class Action Settlement**

27 The proposed Settlement, including a Gross Settlement Amount of \$230,000 meets the standards
28 for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy.

1 (*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation
2 and settlement are the preferred means of dispute resolution.”).) In California, class action settlement
3 approval requires an early “preliminary” review by the trial court and a subsequent “final” review after
4 notice of the settlement has been distributed to class members for their comments and objections.
5 (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the
6 court first “preliminarily approves the settlement” and later “conducts a final approval hearing to
7 inquire into the fairness of the proposed settlement”).)

8 Although California Rule of Court Rule 3.769 does not provide detail as to the scope of review
9 of the proposed settlement, preliminary approval is warranted if the settlement falls within a
10 “reasonable range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27
11 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002)
12 (“Newberg”).) Reasonableness and fairness are presumed where: (1) the settlement is reached through
13 “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court
14 to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.*
15 (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public
16 policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law
17 wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118
18 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners*
19 *for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation
20 and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
21 action litigation”).)

22 Additionally, in reviewing the fairness of a class action settlement, due regard should be given
23 to what is “otherwise a private consensual agreement between the parties.” (*Cellphone Termination*
24 *Fee Cases* (2010) 186 Cal.App.4th 1380, 1389.) The inquiry “must be limited to the extent necessary
25 to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
26 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable
27 and adequate to all concerned.” (*Id.*)

28 ///

1 1. The Parties Reached the Settlement Through Arm’s-Length Bargaining Led by
2 Experienced Counsel.

3 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
4 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
5 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
6 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
7 § 11.51.)

8 The Parties participated in mediation the highly respected mediator and former Santa Clara
9 Superior Court judge (Ret.) Hon. Brian Walsh. Judge Walsh managed the Parties’ expectations and
10 provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc.*
11 *Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008)
12 (mediator’s participation weighs considerably against any inference of a collusive settlement);
13 *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a “mediator’s involvement in pre-
14 certification settlement negotiations helps to ensure that the proceedings were free of collusion and
15 undue pressure.”).) At all times, the Parties’ negotiations were at an arm’s length, adversarial and non-
16 collusive. In fact, despite a full day of mediated negotiations, the Parties reached an impasse and the
17 mediation session nearly concluded without a settlement. The matter resolved only when Judge Walsh
18 issued a mediator’s proposal that the Parties accepted. Judge Walsh only arrived at his proposal after
19 hearing arguments, reviewing evidence and evaluating the Parties’ respective claims and defenses.
20 Zakay Dec., ¶ 22.

21 Once the Parties agreed to the Mediator’s proposal, the Parties engaged in protracted negotiations
22 regarding the written terms of the class action settlement. The Parties maintained the arm’s length, non-
23 collusive and adversarial negotiations while arriving at the final terms of the Settlement. The
24 Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are
25 fair, adequate and represent a reasonable compromise of the claims at issue. Zakay Dec., ¶ 23.

26 2. Class Counsel’s Thorough Investigation Provided an Objective Measurement of the
27 Settlement’s Reasonableness.

28 As set forth in greater detail above, Class Counsel conducted a thorough investigation into the

1 factual and legal issues in dispute. In addition to formal and informal discovery, document review,
2 data analysis and legal research, Class Counsel also researched similar wage and hour actions.
3 Although no two cases are identical, this research provided Class Counsel with a marker to inform
4 settlement discussions and, ultimately, to measure this settlement against. The investigation allowed
5 to Class Counsel to realistically assess the value of Plaintiff's claims and intelligently engage defense
6 counsel in settlement discussions that culminated in the proposed settlement now before the Court.

7 Class Counsel only agreed to enter the Settlement following their thorough investigation and
8 evaluation of Plaintiff's claims. Based on his investigation of the facts, applicable law, and marketplace
9 for similar settlements, and in light of the risk of significant delay, uncertainty associated with litigation,
10 and the various defenses asserted by Defendant, Class Counsel firmly believes this Agreement to be in
11 the best interests of Class. Because the Settlement's terms are fair, reasonable, and adequate, the Court
12 should preliminarily approve the Settlement. Zakay Dec., ¶ 24.

13 3. The Settlement Falls Within the Recognized Range of Reasonableness.

14 The Gross Settlement Amount of \$230,000 is well within the range of reasonable for preliminary
15 approval. To determine whether a settlement is fair and reasonable, the court should "consider enough
16 information about the nature and magnitude of the claims being settled, as well as the impediments to
17 recovery, to make an independent assessment of the reasonableness of the terms to which the parties
18 have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this
19 determination, the court is "not to try the case" but rather "satisfy itself that the class action settlement
20 is within the 'ballpark of reasonableness.' " (*Id.* (emphasis added).) For this analysis, courts do "not
21 require any such explicit statement of value; [they] require[] a record which allows an understanding
22 of the amount that is in controversy and the realistic range of outcomes of the litigation. " (*Munoz v.*
23 *BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The
24 reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery
25 plaintiffs might have received if they had succeeded at trial.² Indeed, "[t]he determination whether a

26
27 ² Federal district courts recognize that there is an inherent "range of reasonableness" in determining whether to approve a
28 settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs
necessarily inherent in taking any litigation to completion." *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; see *In re*
Omnivision Tech, Inc. (N.D. Cal. 2008) 559 F.Supp.2d 1036; see also *Nat'l Rural Telecomm. Coop. v. Directv. Inc.* (C.D.
Cal. 2004) 221 F.R.D. 523, 527 ("well settled law that a proposed settlement may be acceptable even though it amounts to

1 settlement is reasonable does not involve the use of a ‘mathematical equation yielding a particularized
2 sum.’ ” (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael*
3 *Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

4 **a. The Gross Settlement Amount Meets the Recognized Range of**
5 **Reasonableness.**

6 The Gross Settlement Amount of \$230,000 is fair and reasonable considering the nature and
7 magnitude of the claims being settled and the various factual and legal issues in disputes and potential
8 impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop varied economic
9 damages models measuring Defendant’s liability exposure while accounting for the uncertainties of
10 continued litigation. The various models were informed by Class Counsel’s investigation, including the
11 analysis of time and payroll data. Class Counsel projected Defendant’s liability exposure for the Class
12 to be approximately \$1,302,779 for damages and \$1,846,666 for damages and penalties, if successful
13 at trial. This range reflects the uncertainty regarding several of Plaintiff’s claims, together with the
14 uncertainty surrounding derivative liability for inaccurate wage statements and waiting time penalties
15 resulting from meal and rest period violations. Thus, the Gross Settlement Amount of \$230,000
16 represents approximately between 12.4% and 17.6% of Defendant’s liability exposure as estimated by
17 Class Counsel at the time of mediation. The following summarizes Defendant’s estimated exposure if
18 Plaintiffs were to prevail. Zakay Dec., ¶ 24.

19 (1) Estimated Damages for Meal Period

20 Plaintiff alleges that Defendant failed to provide compliant meal periods. Specifically, Plaintiff
21 alleges that because of their rigorous work schedules, Plaintiff and the Class Members regularly worked
22 through what should have been off-the-clock and duty-free meal periods without compensation.
23 Plaintiff also alleged that Defendant rounded meal breaks, sometimes resulting in non-compliant meal
24 breaks appearing to be compliant. Consequently, Plaintiff also alleges that he is owed meal period

25
26 only a fraction of the potential recovery”); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004) 225 F.R.D. 436,
27 460 (“settlement amount’s ratio to the maximum potential recovery need not be the sole, or even dominant, consideration
28 when assessing settlements fairness”); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184
29 (“the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in
30 itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims”); *Officers*
31 *for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is “the complete package, taken as a whole rather than
32 the individual component parts, that must be examined for overall fairness”).

1 premiums and compensation for the off-the-clock work performed during what should have been his
2 duty-free meal periods. Zakay Dec., ¶ 25.

3 Labor Code 512 requires employers to provide employees with thirty (30) minute uninterrupted
4 and duty-free meal period within the first five hours of work. Moreover, an employee who works more
5 than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty-
6 free meal period. Pursuant to Labor Code § 512, an employer may not employ an employee for a work
7 period of more than ten (10) hours, without providing the employee with a second meal period of not
8 less than thirty (30) minutes. Moreover, the second meal period may not be waived if the total hours
9 worked is more than twelve (12) hours. California Lab. Code § 226.7(c) provides that "if an employer
10 fails to provide an employee a meal or rest or recovery period in accordance with a state law, including
11 ... an ... order of the Industrial Welfare Commission, the employer shall pay the employee one additional
12 hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or
13 recovery period is not provided."

14 Defendant denies these claims. Defendant maintains that it paid Plaintiff for every minute that
15 they claimed they worked. Defendant argued that it fully complied with California meal period laws
16 and maintained legally compliant policies and practices as outlined in its Handbook and other policies.
17 Courts have found that where an employer's meal period policies are compliant, individualized issues
18 exist as to the reasons for missed, late or truncated meal periods. *See e.g. Lampe v. Queen of the Valley*
19 *Medical Center*, 19 Cal.App.5th 832, 851 (2018) (holding that although only 11.1% of the employees'
20 time punches for meal periods were within the first 5 hours, the claim was not certifiable because
21 individualized issues existed as to the reasons for the late meal periods). If successful, Defendant
22 availed itself to a complete defense of Plaintiff's meal period claim. Plaintiff estimated the exposure
23 for this claim was approximately \$355,617 if substantiated. Zakay Dec., ¶ 26.

24 (2) Estimated Damages for Rest Period Violations

25 Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically,
26 Plaintiff alleged that as a result of their rigorous work schedule class members were not able to take
27 timely and duty-free rest periods. WC Wage Orders 5-2001 and 7-20017 provide that "[a]uthorized rest
28 period times shall be counted as hours worked for which there shall be no deduction from wages." Lab.

1 Code § 226.7(c) provides that "if an employer fails to provide an employee a meal or rest or recovery
2 period in 13 accordance with a state law, including ... an ... order of the Industrial Welfare Commission,
3 the employer shall pay the employee one additional hour of pay at the employee's regular rate of
4 compensation for each workday that the meal or rest or recovery period is not provided."

5 Again, Defendant denies liability and asserted that they maintained legally compliant rest period
6 policies and practices throughout the Class Period. Moreover, Defendant argued that it not only
7 provided all rest breaks but reminded Plaintiff and employees to take them. Plaintiff recognizes the
8 evidentiary burdens establishing this claim. Establishing Plaintiff's rest period claim would rely,
9 almost entirely, on Class Member testimony, making it a riskier claim at class certification and liability
10 stages. Defendant likely would have argued that only a small number of Class Members missed their
11 rest breaks. Certification likely would have required depositions of Class Members who provided
12 declarations, and Defendant surely would have obtained opposing declarations stating either rest breaks
13 were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal.
14 Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court,
15 plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this
16 Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D.
17 Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the
18 written policy does not generate uniform practices."). Accordingly, the rest break claim was subject to
19 significant defenses. If successful, Defendant availed itself to a complete defense of Plaintiff's rest
20 period claim. Plaintiff estimated the exposure for this claim was approximately \$476,454 if
21 substantiated. Zakay Dec., ¶ 27.

22 (3) Defendant's Estimated Exposure for Unpaid Wages

23 Plaintiff alleged that because of Defendant's unlawful rounding policy, it failed to pay Plaintiff
24 and the Class Members all wages due for purposes of straight pay, overtime pay, and double-time pay.
25 Defendant denied liability and asserted that its employees were paid for all time worked. Defendant
26 argued that employees review and verify that their pay is correct, and they understand how they are
27 paid. Defendant also argued that its rounding policy, if any, was, for the most part, neutral. Plaintiff
28 estimated Defendant's exposure for this claim to be approximately \$215,255.

Next, Plaintiff alleged that Defendant required the Class Members to work off-the-clock, without compensation, during what was supposed to be their duty-free meal periods. Plaintiff estimated Defendant's exposure for this claim to be approximately \$223,821. This claim, however, was and is subject to the same defenses and arguments raised by Defendant with respect to Plaintiff's meal break claim (see above).

Lastly, Plaintiff alleged that Defendant miscalculated the Class Members' overtime and double time rate when it failed to include non-discretionary incentive compensation in employees' regular rate of pay for purposes of calculating overtime. Defendant denied liability and asserted that its employees were paid for all time worked. Defendant argued that any incentive compensation paid to employees was purely discretionary and did not need to be calculated into their regular rate for purposes of overtime calculation. Plaintiff estimated Defendant's exposure for this claim to be approximately \$31,632. Zakay Dec., ¶ 28.

(4) Exposure for Wage Statement Violations and Waiting Time Penalties

Generally, Plaintiff alleges that Defendant’s aforementioned violations resulted in derivative violations of Labor Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties and weighed the potential recoveries against probable defenses. Specifically, Defendant could argue that Plaintiff could not prove the “willful” prong needed to obtain waiting time penalties under Cal. Lab. Code § 203. Additionally, Defendant could argue that Plaintiff could not show that Class Members suffered an “injury” because of wage statement violations, as required by Cal. Lab. Code § 226. Defendant could also argue that that meal and rest period violations do not entitled employees like Plaintiff and the Class Members to pursue the derivative waiting time and itemized wage statement penalties. (*See Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App. 5th 444; *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal. App. 5th 1308.) Although the Class arguably could have seen a payout of nearly \$1.1 million for these penalties if Plaintiff prevailed on every penalty claim, Plaintiff would not recover any derivative penalties if they failed to prove the underlying claims. Moreover, Plaintiff would have to overcome damaging precedent to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty claims); *Alonzo v. Maximus, Inc.*, 832 F.

Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or actual injury). Plaintiff could not give the penalty claims great weight given that they depended on proving the underlying claims, which according to Defendant were not supported by the facts. Nevertheless, Plaintiff estimated the potential exposure for these claims, if substantiated, was approximately \$543,887 (\$353,237 for waiting time penalties and \$190,650 for wage statement penalties). Zakay Dec., ¶ 29.

(5) Conclusion

In conclusion, the settlement of \$230,000.00 represents approximately 17.4% of the value of the maximum potential *damages* at issue. Even when including the penalties for Plaintiffs' claim for wage statement violations and waiting time penalties under Labor Code Sections 203 and 226, the settlement represents 12.4% of the maximum potential liability, assuming all of these amounts could be proved at trial. This is well within the bounds of reasonableness. (*See Viceria v. Mistras Grp., Inc.* (N.D. Cal. 2016) 2016 WL 5907869, at *3, 7 (approving a California wage and hour settlement where the class received 11.6% of the estimated total liability); *Leverage v. Traeger Pellet Grills, LLC* (N.D. Cal. 2017) 2017 WL 2797811, at *7 (Approving a California wage and hour settlement where the class received 18% of the estimated total liability); *Stovall-Gusman v. W.W. Granger, Inc.*, (N.D. Cal. 2015) 2015 WL 3776765 at * 4 (Approving California wage and hour misclassification settlement where the class received approximately 7.3% of the estimated trial award was within the "range of reasonableness.").)

(6) Defendant's PAGA Exposure

Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties arising from the aforementioned violations. At the time of mediation, Plaintiff estimated Defendant's PAGA exposure at approximately \$1,864,000. Zakay Dec., ¶ 31.

Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no civil penalties, even when Labor Code violations are established. *See also In re Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class

1 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
2 6, 2016) (PAGA penalties denied after trial).

3 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the
4 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
5 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
6 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
7 defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for
8 each pay period the employee worked. Again, Defendant raised several defenses that presented serious
9 threats to the claims of the Plaintiff and the Aggrieved Employees. Defendant asserted that the
10 employment practices complied with all applicable Labor Laws. In addition to those arguments
11 discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.*
12 (2019) 43 Cal.App.5th 885, weakened Plaintiff's claims, on liability, value, and manageability as to the
13 rest period claims. In all, Plaintiff's PAGA liability exposure is hotly contested. Zakay Dec., ¶ 32.

14 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA claims.
15 In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
16 maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with
17 the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.
18 Again, the *Carrington* decision was after Plaintiff actually prevailed at trial, and even then, the PAGA
19 penalties were reduced by 90%

20 **b. Inherent Risks of Continued Litigation Support Preliminary Approval.**

21 "It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot
22 and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to
23 the extent courts assess this factor, it is to 'determine whether the decision to settle is a good value for a
24 relatively weak case or a sell-out of an extraordinary strong case.'" (*Misra v. Decision One Mortg. Co.*
25 (C.D. Cal. 2009) 2009 WL 4581276, at *7.)

26 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
27 certification of similar wage and hour claims are demonstrated by *Donohue v. AMN Services, LLC*
28 (2018) 29 Cal.App.5th 1068 (cert granted.) In *Donohue*, Fourth District Court of Appeal affirmed Hon.

Joel Pressman’s denial of class certification for missed meal and rest periods by call center employees. (See also *O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); see also *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues).) Plaintiff is confident about the strength of his claims. Nonetheless, Plaintiff recognizes that Defendant has factual and legal defenses that, if successful, would potentially defeat or substantially impair the value of Plaintiff’s lawsuit. Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. Zakay Dec., ¶ 33.

“The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation.” (*In re Nvidia Derivs. Litig.* (N.D. Cal. 2008) 2008 WL 5382544, at *3.) Indeed, potential appeals aside, litigating a complex case through trial is inherently perilous regardless of the strengths of merits of the claims:

[N]othing is assured when litigating against commercial giants with vast litigative resources, particular in such complex litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary approval.

(*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1140, *opinion modified* (June 18, 1990).)

1 Finally, continuing to litigate this action would require continued and extensive resources
2 coupled with significant Court time to proceed through trial and post-trial motions; which can often
3 take years. Furthermore, wage and hour litigation are complex and expensive, as it often necessitates
4 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
5 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
6 Defendant would appeal any favorable judgment. Zakay Dec., ¶ 34. “Avoiding such a trial and the
7 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
8 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
9 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
10 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

11 In this matter, Class Counsel negotiated a Gross Settlement Amount of \$230,000 that is roughly
12 between 12.4% and 17.6% Defendant’s maximum liability exposure. Given the amount of the
13 settlement here, as compared to potential value of the claims, offset by the various inherent risks to
14 continued litigation, the settlement is fair and reasonable. Zakay Dec., ¶ 35.

15 **B. The Proposed Notice Informs the Class about the Case and Settlement**

16 The Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977)
17 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to
18 decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object
19 to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal. App. 3d 143, 151-
20 52.) The notice must advise class members “that they may be excluded from the class if they so request
21 and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.”
22 (*Kass*, 67 Cal.App.3d at 106.) In a case such as this involving a significant number of class members,
23 California authorities generally require service of the class notice by mail or similar reliable means.
24 (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)³

25 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class of their

26
27 ³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain
28 to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If
appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice.
Fontana v. Elrod (7th Cir. 1987) 826 F.2d 729, 732.

rights and remedies in this action. The Settlement Administrator will first verify addresses, then mail the proposed Class Notice to entire Class. The Notice will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the class definition, the procedure and time period within which to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Claims. Agreement at §III(L). This method was negotiated by the Parties to ensure delivering the most reasonable method of notice to the Class while ensuring cost effective administration of the Settlement. Zakay Dec., ¶36.

Accordingly, both the method of disseminating the Class Notice and content of the Class Notice satisfy due process and the requirements of California law. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.”).)

C. The Court Should Preliminarily Approve the Class Representative Enhancement Award

Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006).) Enhancement payments “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class.” (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

Approximately 144 members of the Class will share in the estimated \$120,433.33 Net Settlement Amount due entirely to the effort and commitment of Plaintiff. Subject to Court approval and Defendant’s right to object, therefore, the Settlement provides for a Service Award of up to \$10,000⁴ for

⁴ The amount of the requested enhancement payment-\$10,000-is reasonable by reference to the amounts

1 Plaintiff. The Service Award is fair and reasonable compensation for Plaintiff's efforts bringing the
2 action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class
3 Counsel on the status of his case and the strategies for prosecuting the claims, responding to voluminous
4 formal discovery, attending a full day deposition, reviewing the proposed Settlement to ensure that its
5 terms are fair and provide adequate relief for the Class, and agreeing to provide Defendant a general
6 release of all claims arising out of his employment. Zakay Dec., ¶ 38.

7 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Service Award
8 once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above
9 showing is sufficient for preliminary approval of the negotiated Service Award. Zakay Dec., ¶ 39.

10 **D. The Court Should Preliminarily Approve the Negotiated Class Counsel Award**

11 The purpose of a Class Counsel Award in class action litigation is to reward counsel who took
12 the risk of non-payment and invested in a case that achieved a substantial positive result for the class.
13 California courts routinely award attorneys' fees equaling one-third or more of the potential value of
14 the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.* (2008) 162
15 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether the percentage method or the
16 lodestar method is used, fee awards in class actions average around one-third of the recovery.");
17 Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical*
18 *Study, J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of
19 class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent
20 with market rates).)

21 Class Counsel took this matter on a contingency fee basis and invested significant time and
22 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
23 Individual Settlement Share illustrates the demonstrably positive outcome for the Class Members. The
24 Agreement provides for a Class Counsel Award in the amount of one-third of the Gross Settlement
25 Amount and litigation costs and expenses not to exceed \$15,000. Agreement at §III(M)(10). In light
26 of the positive outcome for the Class, and in light of the supporting authority, the proposed Class

27 _____
28 that California courts (both federal and state) have repeatedly found to be reasonable for wage and hour
class action settlements: *See Zakay Declaration.*

Counsel award is fair and reasonable. Zakay Dec., ¶ 40.

Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. Zakay Dec., ¶ 41.

E. California Law Authorizes Provisional Certification for Settlement Purposes

For the purpose of Settlement only, Plaintiff contends, and Defendant does not dispute, that provisional certification of the Class is appropriate. Zakay Dec., ¶ 42.

1. The California Standard for Class Certification

Cal. Rules of Court, 3.769(d) provides that the Court may make an order approving certification of a provisional settlement class at the preliminary approval stage. It is well-established that trial courts should use a "lesser standard of scrutiny" for determining the propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 at n. 19. Class actions are statutorily authorized "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court" (*Cal.Civ.Proc.* Code § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1332.) Class certification is appropriate when there is an "ascertainable class and a well-defined community of interest among class members." (*Sav-On Drug Stores, Inc.* (2014) 34 Cal.4th 319, 326.) Class treatment is appropriate even if class members at some point may be required to make an individual showing as to eligibility for recovery. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207; *Sav-On*, 34 Cal.4th at 333.)

2. The Proposed Class is Ascertainable and there is a Well-Defined Community of Interest Among the Class Members.

Whether a class is "ascertainable" within the meaning of Code of Civil Procedure Section 382 is "determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." (*Lee*, 166 Cal.App.4th at 1334.) Class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records. (*Id.*)

The community of interest requirement embodies three factors: (1) predominant common

1 questions of law or fact; (2) a class representative with claims or defenses typical of the class; and (3)
2 a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code* § 382.)

3 In April of 2012, the California Supreme Court expounded on the element of predominance:
4 The “ultimate question” the element of predominance presents is whether “the issues which may be
5 jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial
6 that the maintenance of a class action would be advantageous to the judicial process and to the litigants.”
7 (*Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).)

8 Generally, the proposed Class consists of all of Defendant’s current and former California
9 employees during the Class Period. Defendant’s records show that the Class Members consists of
10 approximately 144 individuals, making joinder of all Class Members impracticable. Further, because
11 all Class Members are Defendant’s current and former employees, the class is readily ascertainable
12 from Defendant’s regular business records, i.e., payroll records. Zakay Dec., ¶ 43.

13 The California statutes relating to each of Plaintiff’s claims apply with equal force and effect to
14 the entire Class. Factually, Defendant’s policies and practices apply class-wide and Defendant’s
15 liability can be determined by facts common to all members of the class. While Defendant disputes
16 whether the class would be appropriate if the litigation were to continue, it agrees to class certification
17 for purposes of this settlement only. The wage and hour issues are both numerous and substantial, and
18 a class action is the most advantageous method of dealing with the claims of the Settlement Class.
19 Zakay Dec., ¶ 44.

20 Plaintiff’s wage and hour claims are typical of the proposed Class because they arise from the
21 same factual basis and are based on the same legal theories applicable to the other Class Members.
22 Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Class. Plaintiff alleges
23 that he was injured by the same company-wide practices to which the proposed Class was subject and
24 seeks the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the
25 Class by initiating this litigation, undertaking class discovery, and evaluating the proposed settlement
26 to assure that it is fair. Again, the Defendant disputes whether Plaintiff’s claims are typical of the Class
27 for purposes of any continued litigation of the Action but agrees for the purposes of this settlement only
28 that Plaintiff assert claims that are typical of the Class, including claims for meal and rest break

practices and underpayment of wages. Zakay Dec., ¶ 45.

Additionally, Plaintiff is represented by competent Class Counsel who has extensive experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and gained state court settlement approval of the same class-wide causes of action that are at issue in this case. Class Counsel's wage and hour class action experience establishes that they are well qualified to represent the interests of this Class. Zakay Dec., ¶ 46.

A class action is superior to a multitude of individual lawsuits. Given the size and amount of each individual Class Member's claim, Class Settlement Members likely have little incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case adjudication. Zakay Dec., ¶ 47.

IV. CONCLUSION

The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately presented the materials and information necessary for preliminary approval, the Parties request that the Court preliminarily approve the settlement.

Dated: April 21, 2022

ZAKAY LAW GROUP, APC

By: 

Shani O. Zakay, Esq.